APPEAL NO. 031204
FILED JULY 2, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on April 15, 2003. The hearing officer decided that the respondent (claimant herein) sustained a compensable injury on _____; that the claimant had disability beginning on October 20, 2002, and continuing through the date of the CCH; and that the appellant (carrier herein) waived its right to dispute the compensability of the claimant's injury by not timely disputing it. The carrier appeals, arguing that the hearing officer's resolution of the injury and disability issues was contrary to the evidence. The carrier also argues that the hearing officer's resolution of the carrier waiver issue was contrary to the evidence, in light of the documents it attached to its appeal showing that the carrier timely notified the Texas Workers' Compensation Commission (Commission) that it would pay benefits as they accrued. There is no response to the carrier's request for review from the claimant in the appeal file.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

We first address the issue of carrier waiver. Section 409.021 provides that the insurance carrier shall not later than the 7th day after the date on which the insurance carrier receives written notice of an injury begin the payment of benefits or notify the Commission and the injured employee in writing of its refusal to pay. The Supreme Court of Texas in Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002) (hereinafter Downs) held that the failure of a carrier to comply with the pay or dispute provision resulted in the carrier waiving its right to contest compensability. In Texas Workers' Compensation Commission Appeal No. 021944-s, decided September 11, 2002, the Appeals Panel held that the Downs decision applied to cases where carrier waiver was in issue and which came to the Appeals Panel after August 30, 2002, the date the Downs decision became final.

The carrier received written notice of the claimant's injury on October 21, 2002. It was undisputed that the carrier did not pay benefits or agree to pay benefits for the claimant's injury. In evidence at the CCH was a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated November 5, 2002, in which the carrier disputed the claimant's injury. The carrier attaches to its appeal another TWCC-21 in which it agreed to pay all income and medical benefits as they accrued, along with evidence that this earlier TWCC-21 was received by the Commission on October 22, 2002. The carrier argues that both TWCC-21's taken together proves that it satisfied the requirements concerning timely disputing the claimant's injury since the filing of a TWCC-21 agreeing to pay within 7 days then gave it 60 days to timely file a TWCC-21 disputing the claim.

The carrier's argument rests upon its contention that we should consider the TWCC-21 attached to its appeal. First, we note that we will not generally consider evidence not submitted into the record, and raised for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. To determine whether evidence offered for the first time on appeal requires that case be remanded for further consideration, we consider whether it came to the appellant's knowledge after the hearing, whether it is cumulative, whether it was through lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). The evidence attached to the carrier's appeal obviously meets some of the prongs of this test. However, we are persuaded that lack of due diligence was the reason that this evidence was not produced at the CCH. The carrier asserts on appeal that the reason that the evidence was not produced at the CCH was because "[t]hese documents were not made available to the attorney for the carrier prior to the [CCH] and were only recently discovered." Without further evidence as to why documents that were clearly in existence prior to the CCH and under the control of the carrier were not provided to the carrier's attorney prior to the CCH, we cannot say that the carrier has established due diligence. Thus, we do not consider the documents attached to the carrier's appeal. Absent consideration of these documents, the only evidence concerning the carrier's dispute of the claim supports the hearing officer's finding of carrier waiver.

As to the issues of injury and disability, both of these issues are questions of fact. Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given to the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals-level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). In light of the conflicting evidence in the record on the issues of injury and disability, we cannot say, applying this standard, that the hearing officer was incorrect as a matter of law in finding that the claimant sustained a compensable injury

and had disability beginning on October 20, 2002, and continuing through the date of the CCH.

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Chris Cowan
Appeals Judge

_____
Margaret L. Turner
Appeals Judge